IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

S.B.CIVIL MISC. APPEAL NO.877/1998.

Suresh & Others. **VERSUS** Bhairoonlal & Another.

28.11.2006.

HON'BLE MR.JUSTICE DALIP SINGH

Mr.Ashok Sharma, for the appellants.
Mr.Nitin Jain, for the respondents.

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This misc. appeal has been filed challenging the judgment dated 18th July, 1998 passed by the first appellate court whereby the learned first appellate court on the appeal being filed by the defendants-respondents has set aside the judgment and decree of the learned trial court dated 17th December, 1996 and remanded the case to the learned trial court with a direction to the learned trial court to frame an issue with regard to the adverse possession and decide the suit afresh.

While hearing the appeal, the learned lower appellate court has taken note of the plea of the defendants in para 3 of the judgment, which reads as follows:-

> "3- जवाबदावे में प्रतिवादी ने वादग्रस्त कमरों पर सैकडों वर्षों से बुजुर्गों के समय से उनका कब्जा कब्जा बहैसियत मालिक होना बतलाया हैं । उन्होने वादग्रस्त प्लाट परावादी की मिलकियत होना अस्वीकार किया हैं । प्रतिवादी ने वादग्रस्त भूमि पर उनका एडवर्स पजेशन होना क्लैम किया है ।"

While deciding the appeal, the learned appellate court came to the conclusion in para 7 of the judgment as follows:-

> "7- मैंने पत्रावली का अवलोकन किया । जवाबदावे में प्रतिवादी ने वादग्रस्त भूमि पर सैकडों वर्षों से उसके बुजुर्गों के समय से उसका कब्जा होना बतलाया हैं । तथा एडवर्स पजेशन का होना क्लैम किया हैं । वादी ने भी उसके वाद में यह कहा हैं कि जब 1968 में उनके द्वारा प्लांट सं. 16 खरीदा गया तो उसके वादग्रस्त भाग पर प्रतिवादी की मां रामादेवी काबिज थी। अपर सिविल न्यायाधीश ने भी अपने निर्णय में इस तथ्य को सिद्ध होना माना हैं । इसलिये मेरी राय में एडवर्स पजेशन के आधार पर मामले में विवाधक बनाया जाना आवश्यक थी और उस विवाधक करे तय करने के पश्चात् ही वाद में सहीं निर्णय पारित हो सकेगा ।"

Having held so, the learned appellate court came to the conclusion that the matter requires to be remanded to the learned trial court with a direction to frame an issue on the plea of adverse possession. It is not in dispute that the defendants, respondents herein, had taken the plea of adverse possession in their additional pleas-para 1 and had specifically stated that the plaintiffs are not entitled to a decree as the defendants had acquired the title by adverse possession. Order 14 Rule 1 CPC clearly provides that the court is required to frame issues on the material propositions of fact or of law on which the parties are at variance, and thereafter having framed issues, record the evidence and give findings on the issues on which the right of parties depend.

In the instant case, the plaintiffs had filed the suit for the recovery of possession of the property in dispute basing their claim upon the title on account of the sale-deed executed in their favour in the year 1968. On the other hand, the case of the defendants in the

additional pleas of the written statement, *interalia* was that the plaintiffs cannot succeed as they have acquired title by adverse possession on account of the fact that they have been in possession in their own right since over 100 years.

Learned counsel for the appellant took me through the judgment of the learned trial court dated 17.12.1996 at great length and in particular para 17 of the same with reference to the findings on issues No.1 and 3 to suggest that the entire evidence was recorded by the learned trial court the parties had led evidence on the question of adverse possession and, therefore, there was no necessity for remanding the case as the learned trial court had in fact adjudicated the matter with reference to the plea of the defendants on adverse possession even without framing the issue.

So far as the above submission of the learned counsel for the appellant is concerned, I have gone through the judgment of the learned trial court dated 17.12.1996, on which reliance has been placed by the learned counsel for the appellant. A perusal of para 17 of the judgment of the learned trial court goes to show that the learned trial court has completely ignored the plea of the defendants and has decided the issue No.1 only with reference to the title. The learned trial court held as follows :-

> "प्रतिवादीगण 62 फुट 6 इंच X 20 फुट अर्थात प्लाट नम्बर 16 के आधे भाग पर बहैसियत मालिक काबिज होना कथित करते है और यह कथन किया है कि उसके प्लाट के कोई नम्बर नहीं है उसे पता नहीं कि उनके बुजुर्गो के पास यह प्लाट कैसे आया । प्रतिवादीगण ने इस भूखण्ड के स्वामित्व बाबत कोई दस्तावेज पत्रावली पर प्रस्तुत नहीं किया

और न ही कोई स्वामित्व का दस्तावेज होना कथन किया है बल्कि बिजली के बिल व मतदाता सूची की प्रति प्रस्तुत की है । जिससे स्वामित्व नहीं बल्कि कब्जा देखा जा सकता है और कब्जे का कोई विवाद नहीं है क्योकि स्वयं वादीगण यह कथन करके आये है कि जब उन्होने रजिस्टर्ड विक्रय पत्र से भुखण्ड सखंया 16 खरीदा तब प्रतिवादीगण की माता रामादेवी एक कोने मेंदो खाम कमरे बनाकर रह रहे है और उसने अपनी गरीबी होना कथन करते हुए कुछ समय और रहने की अनुमति मांगी थी । उपरोक्त निष्कर्ष से मैं यह पाता हूँ कि प्लॉट नम्बर 16 का वादीगण जरिये रजिस्टर्ड विक्रय पत्र स्वामि है और बहैसियत मालिक इस पर काबिज भी है लेकिन इस सम्पूर्ण प्लाट पर उनका भौतिक कब्जा नहीं है बल्कि लगभग आधे हिस्से पर उनका कब्जा है और आधे प्लाट पर प्रतिवादीगण का कब्जा है जिस कब्जे की प्राप्ति हेतू यह दावा प्रस्तुत किया गया है और इस प्रकार 62 फुट 6 इंच 40 फुट के प्लाट नम्बर 16 के वादीगण स्वामी हैं और उक्तानुसार काबिज है । अत: तनकी संख्या एक वादीगण अपने पक्ष में साबित करने में सफल रहे हैं ।"

Look at the above finding on which the reliance has been placed by the learned counsel for the appellant, in my view, goes to show that the same has been dealt with only with regard to the title of the plaintiff and not with reference to the plea which the defendants have raised pertaining to the adverse possession and the right of the plaintiffs to recover the possession of the portion of the land on which the defendants claim adverse possession.

I am, therefore, in agreement with the finding given by the learned lower appellate court that in the absence of the issue having been framed by the learned trial court pertaining to the plea of adverse possession, the learned trial court failed to record the finding on the said plea raised by the defendants and, therefore, there was miscarriage of justice.

Consequently, this appeal stands dismissed. The suit is an old one and, therefore, it is expected that the learned trial court, to whom the case has been remanded by the learned appellate court, will take steps

to decide the same expeditiously. The parties are directed to appear before the learned trial court on 18.12.2006. The stay order vacated and the stay application also stands disposed of.

(DALIP SINGH),J.

Solanki DS, Jr.P.A.